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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

617

GENERAL PRECISION, INC.,

Petitioner,

—against—

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND APPENDICES

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

GENERAL PRECISION, INC.,

Petitioner,

—against—

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, General Precision, Inc., prays that a writ of certiorari issue to the United States Court of Appeals for the Third Circuit for a review of the judgment below, entered on August 4, 1967.

Opinion Below

The opinion of the Court of Appeals (Appendix A) is reported at —— F. 2d ——, 65 LRRM 2843 (1967).

Jurisdiction

Jurisdiction of this Court to review the judgment below is based upon 62 Stat. 928, Title 28 U. S. C. §1254 (1).

Questions Presented

1. Whether it is illegal for supervisory members of an employer's personnel department to assist and counsel individual rank and file employees (white and blue collar), who wish this assistance, in the presentation of their grievances.

2. Whether such supervisors may be deemed an unlawfully dominated "successor labor organization" to a previously disestablished labor organization of rank and file employees.

3. Whether the National Labor Relations Board, by using a contempt proceeding as a vehicle to test out novel issues of law without benefit of prior Board hearing and decision, has abdicated its responsibilities and departed from the Congressional design.

4. Whether it can be said on the record here that the established rule in contempt proceedings requiring clear and convincing evidence without ground to doubt the wrongfulness of the conduct with respect to the law in general and the decree in particular, was met.

Statute Involved

The pertinent statutory provisions of the National Labor Relations Act, as amended ("the Act") (49 Stat. 449, 61 Stat. 136, 73 Stat. 519, Title 29, U. S. C. §151 *et seq.*) are set forth in Appendix B, *infra*.

Statement of the Case

A. The Proceedings

On July 13, 1967, the Court of Appeals for the Third Circuit, acting on a petition by Respondent, the National Labor Relations Board, without hearing any evidence, summarily held Petitioner, General Precision, Inc., in civil contempt of that Court's Consent Decree of October 6, 1965. On August 19, 1967, the Court of Appeals stayed execution of this judgment pending the timely filing of a petition for certiorari and the disposition thereof by this Court.

B. The Facts

The specific events in this case are undisputed.

1. *The Hourly Employees Committee*

In 1953 a request for recognition, supported by a petition signed by a substantial number of Petitioner's hourly employees, led to the establishment of the Hourly Employees Committee ("the HEC"). Thereafter, the HEC, in behalf of the hourly employees, engaged in collective bargaining negotiations with management and the processing of grievances with respect to labor disputes, wages, rates of pay, hours of employment, and conditions of work (Herbert Affidavit, para. 3; R. Exh. E, p. 1).

In early 1965, a charge claiming the HEC was Company-dominated was filed with Respondent. Although the HEC possessed many of the attributes of an independent labor organization (including its structure, election of officers and collective bargaining activities), and effectively functioned as such, it, as well as Petitioner, agreed with the National Labor Relations Board to an Order of disestab-

lishment (Herbert Affidavit, paras. 4-9), enforced by Consent Decree. The Order provided in pertinent part that Petitioner cease and desist from:

> "(a) Dominating and interfering with the administration of the Hourly Employees Committee, or any successor thereto within the meaning of the Act at . . . [its] New Jersey plants, and assisting or contributing support to such Committee"; and
>
> "(b) In any manner, interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form, join, or assist a labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purposes of collective bargaining, or other mutual aid or protection, or to refrain from any or all such activities . . . , provided, however, the provisions hereof shall not be deemed to abridge . . . [its] rights under Section 8(c) of the Act." (*Id.*, para. 14)

In addition, Petitioner agreed to affirmatively:

> ". . . Withdraw and withhold all recognition from the Hourly Employees Committee, or any successor thereto within the meaning of the Act, at . . . [its] New Jersey plants as the exclusive representative of its employees for the purpose of dealing with . . . [it] concerning grievances, wages, hours, or other conditions of work, and completely disestablish, within the meaning of the Act, said organization of its employees." (*Ibid.*)

2. *Disestablishment of the HEC*

Pursuant to the settlement stipulation, Petitioner, in August 1965, unequivocally informed its employees of the disestablishment of the HEC and of the various steps in connection therewith. Officers and Committeemen of the HEC similarly informed the hourly employees of the disestablishment. Thereafter, the HEC ceased functioning in any manner whatsoever (Herbert Affidavit, paras. 15-17; Answer, para. Thirteenth; P. Exhs. 1-9; R. Exhs. C-F).

3. *The Employee Counselors*

As a result of the disestablishment of the HEC and in order to comply with the Board Order, Petitioner was compelled to revise its grievance procedures and the rules respecting channels of communication open from employees to management.

It was decided to extend further Petitioner's "Open Door" policy, a policy aimed at providing (1) both salaried and hourly employees with means of seeking, on a voluntary basis, information, clarification of policies, and assistance in resolving problems, informally or otherwise; and (2) a monitor of the practices and implementation of Petitioner's personnel policies so as to prevent unwarranted diversions from said policies and their intent (Herbert Affidavit, para. 18).

This was accomplished, in part, by making available to the employees—*both hourly and salaried*—the services of employee counselors from Petitioner's Personnel Department.[1] With respect to the resolution of employee com-

[1] These employee counselors have, *inter alia*, conducted product surveys, monitored performance reviews, evaluated supervisor-

plaints, the new procedure has allowed each employee the options of processing his grievance a) on an individual basis without any assistance, b) with the assistance of a fellow hourly employee or c) with the assistance of an employee counselor (Herbert Affidavit, para. 19; Answer, paras. Fifteenth-Seventeenth).

In all instances, the counselor is acting as a clearly identified member of management (Herbert Affidavit, paras. 20-21; Answer, para. Seventeenth). While he will speak for an employee in the grievance procedure, he will not advocate any position inconsistent with the facts of a particular case or the policies of management in general. This is understood both by the employee and the counselor and if the employee's complaint is at odds with Company policy, the counselor will so inform the employee. If the employee persists in his demand that the case be processed further, and with the aid of the counselor, the most the latter will do is present, without urging, the views of said employee (Herbert Affidavit, para. 22).

Should the counselor, in the course of assisting an employee, learn of any infraction of Company policies, he will instruct the employee to refrain from any further infractions and, where appropriate, will take the matter up with other supervisory personnel (*Id.*, para. 23).

At present there are three employee counselors. All are exempt employees under the Fair Labor Standards Act, earn between $170 and $233 per week, and are classified in

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employee relations, implemented various programs (e.g., the "Human Relations" and "Promotion from Within Training" programs), provided informational services, and participated in the formal and informal resolution of employee complaints (Herbert Affidavit, para. 19; Answer, paras. Fifteenth-Seventeenth).

a salary structure with other executive, professional, and administrative employees (*Id.*, para. 25). By virtue of their duties, the counselors are, undisputably, "supervisors" within the meaning of the National Labor Relations Act. See, 49 Stat. 450, Title 29 U. S. C. §152(11).

4. *The New Charge*

On or about March 7, 1966, an individual employee of Petitioner filed with Respondent a *new* unfair labor practice charge against Petitioner which in no way referred to the prior settlement stipulation, Board Order or Court Decree (Herbert Affidavit, para. 30; Answer, para. Sixth). In pertinent part, the charge attacked the employee counselor system.

After an investigation of the charge, several months passed without any word as to its outcome. Two inquiries by Petitioner simply elicited the information that the matter had been submitted to the General Counsel's office in Washington for advice—a procedure normally followed in cases involving difficult or unusual questions of law (Herbert Affidavit, para. 31; Answer, para. Eighth).

On or about August 26, 1966—almost *six months* after the charge was filed—Petitioner was given its *first* indication that the Board considered the counselor system unlawful, let alone an unlawful successor labor organization to the HEC in violation of the Court Decree, when it was served with the papers in the contempt proceedings herein (Herbert Affidavit, para. 32; Answer, paras. Ninth, Tenth).

Basis for Federal Jurisdiction in Court of First Instance

Jurisdiction of Respondent's motion for a summary adjudication in civil contempt against Petitioner was entertained by the Court of Appeals on the basis of Respondent's allegation that Petitioner had violated the terms of the Consent Decree entered by the Third Circuit against Petitioner on October 6, 1965, pursuant to 49 Stat. 454, Title 29, U. S. C. §160(e).

Decision of the Court Below

The Court below held that the employee counselor system constitutes an unlawful dominated labor organization and successor to the admittedly disestablished HEC in violation of Section 1(a) of the Decree. It further held that this system represents an unlawful attempt by Petitioner to interfere with its employees' right of self-organization in violation of Section 1(b) of the Decree (Appendix A, pp. viii, x, xi).

Legal support for these conclusions is non-existent. Not one authority supporting the findings of unlawfulness was cited by the Court below. Plainly, the decision involves new law. Further, it introduces a severe restriction on management's conduct of its relationship with its employees for which there is neither authority nor sanction in law.

It involves new law which was declared, contrary to the established legislative scheme, without benefit of the National Labor Relations Board's expertise applied in the normal manner after hearing and decision.

It involves new law erroneously denominating a personnel department as a "successor" labor organization to

a prior disestablished hourly employees committee and applies a rule of successorship at odds with established precedents, including its own.

And, it involves new law made in a civil contempt proceeding—notwithstanding the requirement that such adjudications be founded upon clear and convincing evidence, free from doubt as to the wrongfulness of the conduct with respect to the law in general and the existing decree in particular.

Reasons for Granting Writ

The decision in this case, if allowed to stand, would threaten any Company policy which imposed on its supervisors, at any level, a duty to weigh and consider the rights and interests of rank and file employees in the settlement of grievances and which publicized the fact that the supervisors were so charged. It would likewise threaten any Company policy which encouraged recommendations for settlement by one level of supervision to another. It would interpose a wall of silence between employees and management in an area where free and ongoing communication is essential to industrial peace and justice.[2]

This Court should grant certiorari because:

I. The decision below involves important questions of federal law which have not been, but which should be, settled by this Court, viz.:

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[2] Filed herewith are copies of an article entitled "The Corporate Ombudsman" appearing in the May-June *Harvard Business Review*. The article advocates adapting the ombudsman procedure to American business to further industrial democracy and justice. The decision below, if permitted to stand, could effectively close the door to any such approach in the area of employer-employee relations.

1. Whether Section 2(5) and related sections of the National Labor Relations Act, which pertain to the activities of labor organizations, can be applied to declare illegal the activities of supervisory members of an employer's personnel department who assist individual employees requesting assistance in presenting their grievances (see p. 8, *supra*).

2. Whether, under the Act, supervisory members of a personnel department can be deemed a "successor labor organization" to an unlawfully dominated labor organization of rank and file employees (see pp. 8-9, *supra*).

II. The decision below involves such a departure from the usual, accepted course of proceedings as to call for review by this court.

1. The use of a contempt proceeding as a vehicle to test out novel issues of law without benefit of a prior National Labor Relations Board hearing and decision is an abdication of the Board's responsibilities and a departure from the Congressional design (see p. 8, *supra*).

2. There exists in this case a departure from the established rule in contempt proceedings requiring clear and convincing evidence without ground to doubt the wrongfulness of the conduct with respect to the law in general and the decree in particular (see p. 9, *supra*).

ARGUMENT

I.

The decision below involves important questions of federal law which have not been, but which should be, settled by this Court.

The decision below, in simultaneously declaring the counselor system to be unlawful in itself, as well as a "successor" labor organization in violation of the Court's Decree, involves important and fundamental questions of federal law which have not been settled by this Court. It is the position of Petitioner that these questions were not properly before the Court below (see discussion, *infra*, pp. 17-25). Should it be determined, however, that these questions were properly before the Court of Appeals, the decision, because of its widespread implications, should not be permitted to stand.

1. Whether Section 2(5) and related sections of the National Labor Relations Act, which pertain to the activities of labor organizations, can be applied to declare illegal the activities of supervisory members of an employer's personnel department who assist individual employees requesting assistance in presenting their grievances.

Section 2(5), in pertinent part, defines a "labor organization" as:

> " . . . any organization of any kind or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers

concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work." 61 Stat. 138, 29 U. S. C. §152 (5).[3]

Never before has this Court—or any lower court—or even the Board itself, ruled upon the validity of the counselor plan, or any analogous plan, in relation to Section 2(5) or these other sections of the Act. Indeed, Petitioner's research has failed to reveal one authority which, in any way, treats with the subject, much less declares it unlawful. Significantly, not one such authority was cited by Respondent in its memoranda to the lower court. Perhaps most significantly, not one such authority was cited by the Court below in its opinion declaring the plan to be unlawful.[4]

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[3] Other pertinent sections of the Act are Sections 7, 8 (a) (1), and 8 (a) (2), 49 Stat. 452, 61 Stat. 140, 29 U. S. C. §§157, 158 (a) (1), (2).

Section 7 provides in pertinent part:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . . ."

Sections 8(a)(1) and (2) provide that it shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

"(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* that subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay."

[4] In support of its contention that no novel questions of law are raised by the employee counselor system, Respondent did cite sev-

The fact of the matter is that the counselor plan constitutes an effort on the part of management to establish an enlightened personnel relations program. The plan is designed to provide employees with a maximum flow of information, ready access to management and an effective procedure for the resolution of employee problems.

The broadly worded decision below places in jeopardy numerous activities heretofore regarded as lawful. Foremen, personnel relations people, and other supervisors engaged in activities in the interest of, and in behalf of, hourly employees may suddenly find themselves branded a "labor organization" engaged in prohibited activities.

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eral cases. Two of these cases involve established, recognized, outside labor unions, both affiliated with the AFL-CIO but assisted or dominated in connection with employee elections and collective bargaining negotiation committees. See, *Nassau and Suffolk Contractors' Assn., Inc.*, 118 NLRB 174 (1957); *Master Stevedores Ass'n of Texas, etc.*, 156 NLRB No. 78 (1966). The remaining cases all deal with classic examples of assisted or dominated employee shop committees, associations or plans initiated by the employer, involving collective employee participation and representation in one or more of the following areas: elections, meetings, by-laws, subcommittees, grievances, and bargaining negotiations. See, *Mt. Clemens Metal Products Co.*, 126 NLRB 1297, enforced in relevant part, 287 F. 2d 790 (6 Cir. 1961); *N. L. R. B.* v. *Pacific Greyhound Lines*, 303 U. S. 272 (1938); *N. L. R. B.* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261 (1938); *N. L. R. B.* v. *Newport News Shipbuilding & Drydock Co.*, 308 U. S. 241 (1939); *Indiana Metal Products Corp.* v. *N. L. R. B.*, 202 F. 2d 613 (1953); *American Enka Corp.* v. *N. L. R. B.*, 119 F. 2d 60 (4 Cir. 1941); *N. L. R. B.* v. *Saxe-Glassman Shoe Corp.*, 201 F. 2d 238 (1 Cir. 1953); *N. L. R. B.* v. *Stow Mfg. Co.*, 217 F. 2d 900 (2 Cir. 1954); *International Harvester Co.*, 2 NLRB 310.

None of these cases—nor any other cases cited by Respondent—even remotely resembles the fact situation here in question, i.e., the activities of a personnel department dealing with individual employee problems. And none of these cases apparently was deemed pertinent enough by the Court below to cite in support of its conclusions.

Broken down into the essential elements of Section 2(5) of the Act, attempts to assist or counsel individual employees in the resolution of their problems may—if the decision below is accepted as authoritative—be interpreted as an "employee representation plan" within the meaning thereof. Efforts by foremen or other supervisory personnel to convince higher management of the validity of employee complaints, where justified, may be similarly interpreted; and so, apparently, may policies requiring foremen —or other supervisory personnel—to present the positions of individual employees, at the request of the employees, to higher management in order to assure the full airing of complaints.

By the same token, these efforts might be deemed attempts to "deal with employers" within the meaning of Section 2(5)—notwithstanding that this section has, at least until now, never been construed to encompass the conferring by one level of management with another level of management in the manner described above.

Further, acceptance by employees of such assistance or cooperation will, of necessity, be construed as the employee participation required under Section 2(5). Still further, under the broad catch-all language of Section 2(5) (viz., "grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work"), virtually all personnel activities of foremen, personnel departments, or management in general may be subject to similar holdings.

Moreover, any attempt by an employer to emphasize these activities during a union organizational drive, in the hope of dissuading the employees of the need for a union, similarly might be construed unlawful—notwithstanding the provisions of Section 8(c) of the Act, which provide:

"The expressing of any views, argument, or opinion, or the dissemination thereof, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit." 61 Stat. 142, 29 U. S. C. §158(c). See also, in this regard, paragraph 1(b) of the Decree, *supra*, p. 4.

The importance of the interpretation of Section 2(5) and related sections of the Act, as applied to employee representation, already has been recognized by this Court. See, *N. L. R. B.* v. *Cabot Carbon*, 360 U. S. 203, 204 (1959), where the Court stated:

" . . . Because of an asserted conflict of . . . [the Court of Appeals] decision with the decisions of other Courts of Appeals, *and of the importance of the matter to the proper administration of the National Labor Relations Act, we granted certiorari.*" [Emphasis supplied.]

2. Whether, under the Act, the supervisory members of a personnel department can be deemed the "successor" labor organization to an unlawfully dominated labor organization of rank and file employees.

The original Order, as proposed by Respondent, included all-encompassing language requiring Petitioner to withhold recognition from, and cease dominating and interfering with, the HEC *"or any other labor organization"* (P. Exh. 12). [Emphasis supplied.] Petititoner rejected this language as being unduly broad. It insisted upon—and Respondent agreed to—the more common, restricted language presently found in the Decree, i.e., "or any *suc-*

cessor" labor organization. [Emphasis supplied.] The entire Decree, therefore, must be read in this context; for unless there is a finding of successorship, Petitioner will have been found in contempt on the basis of language intentionally *excluded* from the Consent Decree.

In this regard, the issue of successorship raises an important question of federal law which has not been, but which should be, settled by this Court, viz., definition of the term "successorship" within the meaning of the Act. If the term is to be applied in such a way as to encompass any labor organization which is a successor solely in point of time, the term will be rendered meaningless. Similarly, if the term is to be applied in such a way as to encompass any operational set-up solely because it pertains to "grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work", again it will be rendered meaningless. And if the term is to be applied in such a way as to encompass any attempt by management, subsequent to an order of disestablishment, to achieve through its personnel department a meaningful procedure for the resolution of problems and the airing of complaints, the result can only be a gross distortion of its meaning and a serious undermining of the rights of management.

Accordingly, should it be determined that the issue was properly before the Court of Appeals, it is urged that this Court review the matter in order to resolve these very important and fundamental questions.

II.

The decision below involves such a departure from the usual, accepted course of proceedings as to call for review by this Court.

1. The use of a contempt proceeding as a vehicle to test out novel issues of law without benefit of a prior National Labor Relations Board hearing and decision is an abdication of the Board's responsibilities and a departure from the Congressional design.

Notwithstanding the novel issues raised herein, Respondent has sought to *test* the legality of the system by way of the contempt proceedings below. It has done so without benefit of any prior decision either by the courts or by the Board, the agency charged with the exercise of its expertise in this area.[5]

In so acting, Respondent has short-circuited, and so far departed from the Congressional scheme as to urgently call for corrective action by this Court.

Perhaps, in this regard, Respondent's six-month delay in determining the course of action to take and its failure to notify Petitioner of any unlawful behavior during that period is indicative of the extent to which Respondent has wrestled with the uncertain and novel issues involved.

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[5] The Court below refers to "the Board's finding that . . . [Petitioner's] current plan is a successor labor organization to its H.E.C." (Appendix A, p. ix). But there was no such Board finding (nor indeed *any* findings by the Board). There was merely this application to punish, in which General Counsel for the Board made certain allegations.

Under Respondent's theory, the conduct described above (pp. 13-15) could be construed as involving, within the meaning of Section 2(5), an "employee representation . . . plan, in which employees participate and which exists for the purpose, in whole or in part of dealing with employers concerning grievances. . . ." We disagree with this construction. Even if the words of the Act literally could be applied to the situation at hand, we point out what has been repeatedly stated by this Court in connection with the various provisions of the Act, viz., that, quite often, language in the Act which may appear unambiguously to embrace the conduct in dispute very well may *not* embrace the conduct at all. See, e.g., *N. L. R. B.* v. *Allis-Chalmers Mfg. Co.*, —— U. S. —— (1967), 65 LRRM 2449; *National Woodwork Mfgrs. Assn.* v. *N. L. R. B.*, —— U. S. —— (1967), 64 LRRM 2801, 2803; *N. L. R. B.* v. *Fruit Packers, Local 760,* 377 U. S. 58, 71-72 (1964); *N. L. R. B.* v. *Servette, Inc.*, 377 U. S. 46 (1964); *Local 761, IUE* v. *N. L. R. B.*, 366 U. S. 667 (1961); *N. L. R. B.* v. *Drivers Local Union*, 362 U. S. 274 (1960); *Local 1976, United Brotherhood of Carpenters* v. *Labor Board*, 357 U. S. 93, 98-100 (1958); *N. L. R. B.* v. *Lion Oil Co.*, 352 U. S. 282 (1957); *Mastro Plastics Corp.* v. *N. L. R. B.*, 350 U. S. 270 (1956); *N. L. R. B.* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240 (1939). As stated in the *Allis-Chalmers* case, 65 LRRM at 2450:

> " . . . We have only this Term again admonished that labor legislation is peculiarly the produce of legislative compromise of strongly held views, Local 1976, Carpenters Union v. Labor Board, 357 U. S. 93, 99-100, 42 LRRM 2243, and that legislative history may not be disregarded *merely because it is arguable that*

a provision may unambiguously embrace conduct called in question. National Woodworkers Assn. v. Labor Board, —— U. S. ——, to ——, 64 LRRM 2801." [Emphasis supplied.][6]

In keeping with the established legislative design, therefore, the proper course would have been to follow the path of Board hearing and decision *before* judicial review in order to furnish full consideration to the complex issues involved.

2. There exists in this case a departure from the established rule in contempt proceedings requiring clear and convincing evidence without ground to doubt the wrongfulness of the conduct with respect to the law in general and the Decree in particular.

a. *The burden of proof*

The decision at hand, involving an adjudication in civil contempt, of necessity entails a finding of violation of an outstanding court decree. See, *N. L. R. B.* v. *Express Publishing Co., Inc.,* 312 U. S. 426 (1941); *N. L. R. B.* v. *Reed and Prince Mfg. Co.,* 196 F. 2d 755 (1 Cir. 1952). The burden in establishing such a violation is a heavy one. As stated by the Court in *Schauffler, Local 1291, ILA,* 292 F. 2d 182, 189-90 (3 Cir. 1961):

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[6] While Respondent contends that legislative history does buttress its position (S. Rep. No. 573 on S. 1958, 74th Cong., 1st Sess. 10, II Leg. Hist. '35, p. 2310; II Leg. Hist. '35, p. 2334; H. Rep. No. 972 on S. 1958, 74th Cong., 1st Sess. 16, II Leg. Hist. '35, p. 2972), an examination of that history supports no such conclusion. As is true of the case law, such history is barren of any intention to proscribe, under the provisions of the Act, the supervisory activities of a personnel department dealing with individual employee problems.

> ". . . It is well settled that the petitioner in a civil contempt proceeding must prove a violation of the court's order by more than a mere preponderance of the evidence. Some courts have indicated that the petitioner must produce 'clear and convincing evidence'. Other courts have held that the violation must be shown by 'a clear preponderance of the evidence'. Some of these courts and still others have indicated that a 'degree of certainty is required which leaves no fair ground of doubt' as to the violation of the court's order. Whatever the precise language used it must be taken as settled that a petitioner in a civil contempt proceeding must overcome a heavy burden of proof. See the summary of the law in Kansas City Power & Light Co. v. NLRB, 8 Cir., 1943, 137 F. 2d 77, 79."

The standard approved by the Third Circuit, stated in *Fox* v. *Capital Co.*, 96 F. 2d 684, 686 (3 Cir. 1938), and reiterated in *Schauffler* v. *Local 1291, ILA, supra,* at 190, is as follows:

> ". . . The plaintiff has a heavy burden to show a defendant guilty of civil contempt. It must be done by 'clear and convincing evidence,' and *where there is ground to doubt the wrongfulness of the conduct of the defendant, he should not be adjudged in contempt.* California Artificial Stone Paving Co. v. Molitor, 113 U. S. 609. . . ." [Emphasis supplied.]

Notwithstanding this clearly stated guideline, the Court below has attempted to resolve a complex issue of law never before considered, much less ruled upon. It has done so without benefit of one legal citation to support its position. It has done so, contrary to the legislative design, without

benefit of the experience and expertise of the Board which might be revealed through prior hearing and determination.

b. *New and independent circumstances*

The above actions are unsupportable, moreover, when taken, as here, on the basis of new and independent circumstances unrelated to the prior unfair labor practice charge which was the subject of the decree. See, *N. L. R. B.* v. *Express Publishing Co., Inc., supra; N. L. R. B.* v. *Reed & Prince Mfg. Co., supra.* This is especially so when predicated on the catch-all cease and desist language of paragraph 1(b) the Decree; for, as recognized by the courts, there is, and ought to be, a natural reluctance to rely upon such language as the sole basis for entertaining a petition for adjudication in civil contempt. *Ibid.*

The mere fact that the new set of circumstances involves allegations pertaining to the same sections of the Act does not, in and of itself, constitute sufficient basis. See, *N. L. R. B.* v. *Reed & Prince Mfg. Co., supra.* The two entities in question are completely different in terms of concept, origin, structure, procedure, functions, extent and nature of employee and employer involvement, and any other pertinent comparisons to be made.

The HEC originated as the result of a petition by a substantial number of Petitioner's hourly employees and involved considerable employee participation, *on a collective basis,* in such areas as representation, elections, campaigning, bargaining negotiations, grievances and propaganda. It entailed an organizational setup, closed to salaried employees, which was free to elect its own officers, enact its own by-laws, post its own bulletins, make its own

assessments, conduct its own meetings, and determine its own policies (Herbert Affidavit, paras. 4-13).

The employee counselor system involves none of this. It makes available three or four clearly identified supervisory personnel from Petitioner's Personnel Department for purposes of assisting *individual employees—both hourly and salaried*—who, of their own volition, seek help in obtaining information and resolving problems.[7] In performance of their full duties (*supra*, A. 5-6) these counselors are engaging in clearly distinct, commonly accepted personnel department functions. There is no organizational setup, collectively through the employees themselves or through any employee representatives. Neither are there any by-laws, employee meetings, elections, etc., which could possibly be confused by the employees with the prior labor organization, i.e., the HEC—or which could create even the appearance of continuity and relation between the HEC and the employee counselors.[8]

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[7] While two of the counselors previously had served as HEC committeemen, one of these counselors had held this HEC position more than *five years* prior to his appointment and the other did not become a counselor until almost six months after the disestablishment of the HEC when he was promoted to a supervisory position in the normal course of events. The latter, moreover, held the counselor's position for three months only, inasmuch as he received a further promotion shortly thereafter when a new opening arose. Further, these two supervisors were only two of more than one hundred (100) hourly employees who had served as officers or committeemen of the HEC, eighteen (18) of whom—like these two—subsequently were promoted to supervisory positions in the normal course of events (Herbert Affidavit, paras. 26-27).

[8] As noted by the Court below, the chief function of the counselor is to serve as a direct line to higher management, representing the employees in all matters of Company policy, information and possible grievances. The object was to establish freer, more effective access to management and is consistent with common use of the term "represent" in Company parlance—as evidenced by the

That there was an absolute and public cleavage and clear line of fracture between the two entities, as required by the Board, is perfectly evident, not only from the foregoing distinctions, but from Petitioner's unequivocal, public disavowal and disestablishment of the HEC. See, *Duro Test Corp.*, 81 NLRB 976 (1949); *Hershey Metal Products Co.*, 76 NLRB 695 (1948).[9]

c. *Successorship*

Notwithstanding the above differences—but obviously in recognition of the limitations of the decree—Respondent

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following job titles in Petitioner's Personnel Department, all of which have been in existence for many years: hourly employee representative; senior personnel representative; personnel representative; assistant personnel representative; professional employee representative; professional placement representative and community relations representative (Herbert Affidavit, para. 24).

[9] In this regard, the Court gave much weight to a letter by Petitioner, characterizing it as sharply putting into focus Petitioner's "opposition to unionization"; "patent[ly]" endeavoring to soften the impact of the reasons for the disestablishment of the HEC; and "baldly" stating that present practices, etc. will remain in effect except for revised procedures to provide for grievance assistance and communication through channels other than the disestablished HEC (Appendix A, pp. vii, viii).

First, aside from the fact that the law in no way prohibits noncoercive expression of opposition to unionization (*N. L. R. B.* v. *Armco Drainage & Metal Products*, 220 F. 2d 573 (6 Cir. 1955), cert. denied 350 U. S. 838 (1455); 61 Stat. 142, 29 U. S. C. §158 (c)), the letter in no way speaks of such opposition (P. Exh. 3).

Second, even Respondent never challenged the letter as an improper attempt to soften the impact of the reasons for the disestablishment of the HEC.

Third, the letter simply provided an answer to questions which might naturally arise in employees' minds as to whether then existing practices, policies and procedures covering a host of subjects (e.g., order of layoffs and recall, working conditions, wages and hours, etc.) would be continued despite the disestablishment of the HEC; for not even the Board had interpreted its Order to require a discontinuance of such practices, policies, and procedures. *(Ibid.)*

has attempted to justify its resort to contempt proceedings by denominating the employee counselor system a "successor" to the disestablished HEC. The only legal authorities cited on successorship in the Court below were those cited by Petitioner in *refutation* of the allegation of successorship. See, *N. L. R. B.* v. *Szekely & Associates*, 259 F. 2d 652, 654 (5 Cir. 1958); *N. L. R. B.* v. *Landis Tool Co.*, 145 F. 2d 152, 156-57 (3 Cir. 1944).

In the *Szekely* case, the Board, itself, defined successorship to refer only to an organization "in privity with its predecessor and without genuine cleavage between the old union and the new." 259 F. 2d at 654. While the Court of Appeals attempted, on a highly tenuous basis, to distinguish this definition (Appendix A, p. xi), Respondent, in its reply memorandum to the Court, drew no such distinction. Plainly, under the *Szekely* definition, it cannot be said that the employee counselor plan is in "privity" with the HEC, and that there is no "genuine cleavage" between the two. See, also, *Duro Test Corp., supra; Hershey Metal Products Co., supra.*

Even accepting the following *Landis Tool* definition of the term (which Petitioner believes to be consistent with the *Szekely* definition), it cannot be said that the element of successorship exists herein:

> " . . . *The test of successorship is whether there existed, insofar as the employees are concerned, an appearance of continuity and relation between the preceding illegal organization and the later organization* so that the employees were not apprised of the fact that the new organization did not carry with it the preference, domination, and interference which accompanied the

prior organization" (145 F. 2d, at 156-57). [Emphasis supplied.]

In light of the distinctions outlined above (pp. 21-23), there clearly does not exist even the appearance of continuity and relationship—subjective or otherwise—necessary to establish the counselor system as a successor to the HEC. Or, put in terms of Respondent's burden herein, it surely cannot be said that there exists clear and convincing evidence, free from any doubt, establishing that the counselor system is a successor to the HEC.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: September 13, 1967.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 16132

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

GENERAL PRECISION, INC.,

Respondent.

ON PETITION

Argued April 4, 1967

Before McLAUGHLIN and GANEY, *Circuit Judges* and NEALON, *District Judge.*

Opinion of the Court

(Filed July 13, 1967)

By McLAUGHLIN, *Circuit Judge.*

This matter is before us on the Petition of the National Labor Relations Board for adjudication of respondent in civil contempt and for other civil relief.

It is charged by the Board that respondent has resisted, violated, disobeyed and failed to comply with our decree of October 28, 1965. That decree requires respondent:

"1. Cease and desist from:

(a) Dominating and interfering with the administration of the Hourly Employees Committee, or any successor thereto within the meaning of the Act, at Respondent's New Jersey plants, and assisting or contributing support to such Committee.

(b) In any manner, interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form, join, or assist a labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purposes of collective bargaining, or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized by Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959, provided, however, the provisions hereof shall not be deemed to abridge the Respondent's rights under Section 8(c) of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the National Labor Relations Act, as amended:

(a) Withdraw and withhold all recognition from the Hourly Employees Committee, or any successor thereto within the meaning of the Act, at Respondent's New Jersey plants as the exclusive representative of its employees for the purpose of

dealing with the Respondent concerning grievances, wages, hours, or other conditions of work, and completely disestablish, within the meaning of the Act, said organization of its employees."

The decree followed the consented-to order of the Board of August 17, 1965. That order was itself based on a settlement stipulation between the parties dated July 16, 1965. Prior to the settlement, respondent in its New Jersey plants operated a grievance procedure in which the above named Hourly Employees Committee participated by assisting and representing employees concerned and by disposing of employees grievances as to labor disputes, wages, rates of pay, hours of employment and work conditions.

After respondent's consent to the Board's order and our decree, on August 23, 1965 it revised its said grievance procedure by introducing into it an Employee Counsellor Plan. Through this employees were offered the assistance and representation of Employee Counsellors who at all times have been and are hired and paid by respondent. These were assigned as management representatives to the New Jersey plants personnel departments. Two of them were former Hourly Committee members. This practice was presented by respondent as a smooth transition from the old to the new practice which would satisfy the employees' need for representation. The Employee Counsellors have assisted, counseled and represented large numbers of employees in the processing and presentation of grievances against respondent regarding wages, rates of pay, hours and other terms and conditions of employment. They have for the employees dealt with management about safety practices and other working conditions.

The Board charges that the Employee Counsellor Plan is a labor organization within the meaning of the Act and of the decree and that it is a successor organization to the Hourly Employees Committee, within the purview of the decree and " * * * has been established and recognized and continues to be established and recognized, maintained, dominated and interfered with in violation thereof."

The Board also charges that respondent's pension plan has been administered by an equal number of representatives for management and for the employees called the Central Committee of Administration. Prior to the decree the employee members were designated by the Hourly Employees Committee. Since the decree these have been appointed by respondent directly. The Board therefore charges that the Central Committee is a labor organization and that its administration has been interfered with by respondent.

From all of the above the Board, alleging that respondent has and is violating the decree of this Court, asks that it be held in civil contempt.

Respondent contends that its employee counsellors are acting as clearly identified management personnel. It denies that its Employee Counsellor Plan is a labor organization and that it is a successor organization to the Hourly Committee. With reference to the Central Committee, the respondent now agrees to cease and desist from appointing any hourly employees to this committee and to remove any incumbent employee representatives forthwith.

Respondent on July 16, 1965 consented to the entry of an order by the Board requiring it to completely disestablish the Hourly Employees Committee. In the Board's order based on the agreement and in our decree of October 6, 1965 enforcing that order, appeared the following:

"Respondent General Precision Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Dominating and interfering with the administration of the Hourly Employees Committee, or any successor thereto within the meaning of the Act, at Respondent's New Jersey plants, and assisting or contributing support to such Committee.

(b) In any manner, interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form, join, or assist a labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purposes of collective bargaining, or other mutual aid or protection, or to refrain from any or all such activities * * *

2. Take the following affirmative action which the Board finds will effectuate the policies of the National Labor Relations Act, as amended:

(a) Withdraw and withhold all recognition from the Hourly Employees Committee, or any successor thereto within the meaning of the Act, at Respondent's New Jersey plants as the exclusive representative of its employees for the purpose of dealing with the Respondent concerning grievances, wages, hours, or other conditions of work, and completely disestablish, within the meaning of the Act, said organization of its employees."

Almost immediately following the Board's order, respondent established its Employee Counsellor Plan for

employee grievances. Under it the employee handled the first step; for the three other steps he could request representation. He could choose as his counsellor "1. The Employee Counsellor assigned to his plant from the Personnnel Department, or 2. An hourly employee within his plant and department, who, at that time, is not otherwise involved in any steps of this procedure." A company bulletin to the employees told them that the old H.E.C. grievance procedure was being revised "In compliance with the N. L. R. B. ruling, and for the purpose of having a smooth transition, * * *." Respondent attached a copy of the Employee Counsellor Plan and stated "Employees should not hesitate to use this method of airing these problems nor should they hesitate to use one of the methods of representation."

At the start of the program, respondent appointed three employee counsellors, paying them weekly salaries of between $155 and $245. The following February a fourth counsellor was added. From the exhibits before us, on November 29, 1965 and January 24, 1966, respondent in its listings of open positions stated as follows:

"ADMINISTRATIVE:

EMPLOYEE COUNSELLOR—PERSONNEL DEPARTMENT
Represent hourly employees in all aspects of employee relations. Counsels employees in areas of insurance, hospitalization, wage rates and job classifications. Represents hourly employees as a direct link with top management on working conditions, morale and safety practices. Knowledge of personnel practices, policies, and procedures necessary, knowledge of job analysis desirable.

Plant #1 Shift #1 (JPY Ext. 2916)"

In the first seven months of the plan, Employee Counsellors assisted in 52 of the 75 written grievances processed by the respondent.

By our decree respondent was ordered to cease its domination of and interference with the Hourly Employees Committee or any successor thereto within the meaning of the Act. It was further ordered to cease and desist from "In any manner interfering with, restraining, or coercing its employees in the exercise of their right to self organization * * * ."

It is evident from the record that respondent's Employee Counsellor Plan is in reality merely a careful continuation of its determined effort to dominate and interfere with its employees right to self organization. The labeling of the Counsellors as "management personnel" in no way offsets their avowed purpose of dealing with management on behalf of the employees. Respondent's written representations to its employees respecting its Counsellors stresses that "Their chief function is to serve as direct lines to top management, representing the employees in all matters of Company policy, information and possible grievances." The Counsellor method under which the respondent's Counsellors handled over two thirds of the employees grievances in its first seven months functioning, was pressed upon the employees by respondent as having been instituted "to insure effective handling of employee problems." Its stated purpose was given "to review all complaints thoroughly, quickly and fairly."

Respondent's letter of August 18, 1965 to all hourly employees directly after the Board's disestablishment of the Hourly Employees Committee puts sharply into focus its opposition to unionization of its employees since 1951 and is a patent endeavor to soften the impact of the

reasons for the Board forcing the disestablishment of that Committee. It baldly states that its present practices, etc. "will remain in effect except that the procedures will be revised to provide for grievance assistance and communication through channels other than the now dissolved Hourly Employees Committee." It was shortly thereafter that the Counsellor Plan was installed. Section 2(5) of the Act defines a labor organization as "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work." The participation of the employees is undeniable and respondent is in complete control of the program which is its own creature, subject to its wishes. What it has resulted in is a repetition of the identical violation of the Act which resulted in the Board's order and our enforcement decree in this very situation. Respondent is once more dominating the sole organization available to its employees with respect to their entire relationship to their employer including the handling of their grievances. In so doing respondent as the employer and through its Counsellors representing the employees is affirmatively going against the letter and spirit of the Act. It has proceeded thus deliberately on the theory that it had overcome the factual and legal hazards of its Hourly Employees Committee tactics. It follows that in its present maneuver respondent is far more grievously at fault than the first time. Its offense is clear interference with the employees organizational rights and with the Counsellor Plan which latter we find to be the successor to the original Committee.

We are at a loss to understand the purpose of arguing the conditional closing of the proceeding by the Board. As was specifically noted in the latter's letter this was done first, because up to that date, November 1, 1965, there had been no reported violations by respondent and second, it "was conditioned upon continued observance of said Order and Decree." It was after November 1, 1965 that violations were reported and that the Board ascertained that these were true in fact.

Respondent's next point is titled "The New Charge . . . ." Under this it contends at great length that no evidence exists that respondent failed to disestablish the H.E.C. or that its Counsellor Plan is the successor of H.E.C. and is in turn dominated by respondent. Respondent did formally disestablish its H.E.C. Even while in the process of so doing it was developing its Plan and what it hoped would be a smooth transition over to it from H.E.C. We are satisfied that the Board's finding that the respondent's current plan is a successor labor organization to its H.E.C. and of the same ilk, is founded upon overwhelming evidence on the whole case. The assertion on behalf of respondent that the unlawful conduct now disclosed by the Board is unrelated to the unfair labor practices found by the Board in its order and by this Court in its decree, is without merit. That unlawful conduct is well within the scope of that decree's paragraph 1(a) which with the preamble to the decree reads:

> "The National Labor Relations Board having on August 17, 1965, issued an Order against Respondent, General Precision, Inc., its officers, agents, successors, and assigns and the parties having stipulated that this Court or any other appropriate court may, upon

application by the Board, enter a decree enforcing said order, and this Court having considered the same, it is hereby

ORDERED, ADJUDGED AND DECREED that the Respondent, General Precision, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Dominating and interfering with the administration of the Hourly Employees Committee, or any successor thereto within the meaning of the Act, at Respondent's New Jersey plants, and assisting or contributing support to such Committee."

It is also definitely covered by the intentionally broad language of 1(b) where it states:

"(b) In any manner, interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form, join, or assist a labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purposes of collective bargaining, or other mutual aid or protection, or to refrain from any or all such activities, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized by Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959, provided, however, the provisions hereof shall not be deemed to abridge the Respondent's rights under Section 8(c) of the Act."

Both paragraphs in their cease and desist mandates plainly prohibit respondent's current move which latter is obviously to avoid the impact of the decree upon its employer control. What we are dealing with here is no new charge or new activity on the part of the employer. It is the same old hard core opposition to yielding its grip on the organizational and all other activities workwise of its employees. It is suggested that this is disguised. If so the disguise is just about as effective as the so called clothes of the Emperor.

Respondent in questioning the successorship of the Plan to the H.E.C. cites N. L. R. B. v. Szekely & Associates, 259 F. 2d 652, 654 (5 Cir. 1958). The term "successor" was used there in a quite different context. Nevertheless the successorship of respondent's Plan to its H.E.C., under our glaring facts, would not be contrary to the Szekely concept. This is made apparent by respondent's acceptance of the definition of "successorship" by Judge Kalodner for this Court in N. L. R. B. v. Landis Tool Co., 145 F. 2d 156-157 (3 Cir. 1944). The test of successorship there used was, a strong "appearance of continuity and relation between the preceding illegal organization and the later organization." Applying that test to the Plan, beyond question it is the successor of H.E.C.

We are much impressed with the Board's criticism of respondent's present position in the light of its deliberate consent to the cease and desist order. It suggests that as a minimum the Board has the authority to prevent respondent repeating its illegal conduct in the substantially identical circumstances, this time with the Counsellor Plan, N. L. R. B. v. Ochoa Fertilizer Corporation, 368 U. S. 318 (1961). Our upholding of this petition under the facts is

certainly within our discretion. See N. L. R. B. v. Warren Co., Inc., 350 U. S. 107, 113-114 (1955). We find no reason arising out of the petition for returning the case to the Board for a second and totally uncalled for hearing. See McComb v. Jacksonville Paper Co., 336 U. S. 187, 194-195 (1949).

Finally, we have the charge by the Board that respondent violated our decree by interfering with the operation of the Administration Committee of respondent's pension plan. The cease and desist suggestion of respondent does not concede its unfair labor practice. It does fail to offer any meritorious defense to the Board's complaint. As we see it, this Committee is a labor organization within Section 8(a)(2) of the Act. There are two employee representatives on the Committee, both appointed by respondent. The Committee, including its employee members, passes upon the eligibility of employees for benefits under the pension plan, upon suggestions regarding the plan, all in conjunction with respondent. This plan is financed solely by respondent. Despite this and the element that the final decision on pension plan affairs is with respondent such Committee is a labor organization under Sections 152(5)(8), 158(2) of the Act, 29 U. S. C. A. 152(5)(8), 158(2). See N. L. R. B. v. James H. Matthews & Co., 156 F. 2d 706, 708 (3 Cir. 1946).

In all of the above mentioned transactions the employee members of the Committee deal with the employer who had originated the plan and who dominates the Committee. We find that the operation of the Administration Committee is contrary to the Act and that respondent has violated our decree by interfering with the function of that Committee.

From respondent's admissions in its answer and its letters, bulletins and publications which are before us, there

are no substantial factual questions in dispute and as we have above found, no necessity for a hearing.

From all of the facts and the apposite law we are convinced that respondent has wilfully violated the consent decree of this Court in this case in the respects above indicated and in so doing is guilty of civil contempt. The Board is requested to submit a proposed order promptly.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX B

The relevant provisions of the National Labor Relations Act, as amended (49 Stat. 449, 61 Stat. 136, 73 Stat. 519, 29 U. S. C. §151 *et seq.*), are as follows:

Sec. 2. When used in this Act—

(5) The term "labor organization" means any organization of any kind or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work.

* * * * *

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . . .

* * * *

Sec. 8(a). It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,*

that subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

* * * *

Sec. 8(c). The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.